IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.168 OF 2001

Krishna Valley Development Corporation & Ors. .. Petitioners

Versus

M/s.Atur India Pvt.Ltd. & Ors. .. Respondents

Mr.Vijay Patil for petitioners
Mr.A.V.Anturkar i/b. S.B.Deshmukh for respondent No.1.

CORAM : S.C.DHARMADHIKARI, J.

DATE : 29th November 2007

P.C.

. This petition challenges an order passed by the trial court dated 16th March 2000 and 4th May 2000 in Misc.Application No.320 of 1991. Consequential order of Arbitrators dated 24th November 2000 is also challenged. The first order Exh.A is in Misc.Application No.320 of

1991, which was moved by the present petitioner. That was an application under section 8 of the Arbitration Act 1940 (for short 1940 Act). That application was disposed of by following directions:-

> ". A panel of three arbitrators is appointed to decide the dispute mentioned by applicant company in para 2(a) of this application. The names of panel of three arbitrators will be notified within 15 days from today i.e. 30th March 2000. The parties are at liberty to submit the names of panel of three arbitrators by joint purshis. In the event of not submitting the list of names of panel of arbitrators jointly by the parties, the Court will notify the names of panel of three arbitrators on 30th March 2000. The matter be put up before me on 30th March 2000 for notifying the names of

panel of three arbitrators. No orders as to costs."

Thereafter, names of Arbitrators were given and the learned Judge proceeded to pass an order appointing the Arbitrators.

2. The Arbitrators passed a further order which was also impugned and the view of the Arbitral Tribunal was that the arbitration is deemed to have commenced on 30th June 2000 when their first sitting was held, that being a date when the new Act i.e. Arbitration and Conciliation Act, 1996 (for short 1996 Act) was already in force, the proceedings will be governed by the 1996 Act and not by 1940 Act. Thus, the arbitral panel decided to apply the 1996 Act.

3. This petition was placed before this Court (Justice F.I.Rebello, J) on 29th January

2001 and the following order was passed:-

> ". Based on Shetty's Construction Co.Pvt.Ltd. Vs. Konkan Railway Constructions, (1998) 5 S.C.C. 599 it is contended on behalf of the respondent that as the arbitration clause was invoked before the new Act came into force the old Act must apply. However, considering the Judgement in Thyssen Stahlunion Gmbh Vs. Steel Authority of India Ltd. (1999) 9 SCC 334, wherein Shetty's Construction Co. Pvt.Ltd. (supra) was considered and in view of similar clause in the contract as in Reshma Constructions Vs. State of Goa (1999) Mh.L.J. 462, which has been approved by the Appex Court, it is the new Act that will apply. Considering that liberty to the respondents to move the learned Chief Justice under section

11(6). Liberty to the parties to apply after the decision by the learned Chief Justice.

2. Adjourned sine die.

3. Considering the above, impugned order and further proceedings are stayed till such further directions of this Court."

4. Thereafter, a review petition being Review Petition No.43 of 2002 was also filed, which review petition was disposed of on 9th July 2002. In the meanwhile, the respondent Atur India, pursuant to the liberty granted by this Court filed Arbitration Application No.254 of 2003 invoking the provisions of section 11(6) of the 1996 Act and seeking appointment of Arbitrators. That appointment has been made on 16th April 2004 and the petition was disposed of

in the following terms:-

> ". Accordingly, this application is disposed of by the following order:-
>
> . Shri A.P.Bhave is appointed as a arbitrator to adjudicate the disputes between the petitioner and the respondent. It will be open for the petitioners to raise all contentions including jurisdiction of the arbitrator to take cognisance of the claims made before him. Needless to state that if such application is made the arbitrator shall dispose it of after hearing the parties in accordance w law and uninfluenced by the pendency of the writ petition. All contentions of both sides in that behalf are kept open"

5. The petitioners now pray that this

petition has worked out itself out and must be disposed of. All orders which are made by the Trial Court and the Arbitral Tribunal would not survive any longer. Mr.Patil appearing for petitioner submits that petitioners would not now raise any issue about applicability of 1940 Act inasmuch they accept that the Arbitral proceedings would now be governed by the 1996 Act.

6. In his submission, pursuant to the liberty granted by this Court, first respondent has moved this Court with an arbitration application and sought intervention of the court to appoint an Arbitrator under the 1996 Act. In such circumstances, they are now estopped from relying upon the appointment of the Arbitrators by the civil court or the orders made in that behalf. He submits that the orders passed by the civil court would not survive and would have to be quashed and set aside.

7. Mr.Anturkar, learned Counsel appearing for original petitioners in Arbitration Petition No.254 of 2003 and first respondent to this petition relies upon the judgement of the Supreme Court in the case of U.P.Sugar Corporation Vs. Jain Construction, reported in 2004 (7) S.C.C. 332 to state that once the disputes between parties to arbitration arise an application for appointment is made prior to the commencement of the 1996 Act, then, the proceedings are set is motion, prior to the enforcement of 1996 Act. Hence, the 1940 Act would apply and not 1996 Act. He submits that the order passed by me in the Arbitration Petition relies upon a decision reported in 2003 (10) S.C.C. 572, (State of W.B. Vs. Amritlal Chatterjee) which decision is also referred to in the latter ones by the Supreme Court.

8. In my view, now it is not necessary to

enter into any controversy with regard to the applicability of 1940 Act or otherwise after. All that has transpired during the pendency of this petition. The position is that this Court passed orders on 29th January 2001 and 9th July 2002 so also appointed Arbitrator at the instance of the first respondent on 16th April 2004. It would not be open for them to now urge that the Court must go back to decide the controversy all over again. Now the proceedings would be governed by the 1996 Act, admittedly. There is substance in the contention of Mr.Patil that the first respondent cannot now urge after having applied for appointment of arbitrator under 1996 Act, that the 1940 Act must apply. The apprehension of Mr.Anturkar that the old arbitrators/panel is refusing to hand over papers and documents to the first respondent is without any basis, inasmuch as, firstly, there is nothing on record to show that they have indeed done so. Secondly, assuming that this is their stand, it

is clear that once this Court has stepped in and appointed an Arbitrator, then, the Arbitrators not disputing that 1996 Act would apply, their their plain duty is to abide by the orders of this Court. The Arbitrators appointed under the orders of the civil court will not be in a position to dispute that there is a procedure under the Arbitration Agreement so also under the 1996 Act for appointment of Arbitrators. That having been availed off by the first respondent and the order made on their application, the Arbitrators are bound to abide by the order of this Court and hand over papers and documents to the parties. Once Mr.Patil states that petitioners Krishna Valley Development Corporation would not raise an issue of applicability of 1940 Act but would proceed on the basis that 1996 Act applies, then, other apprehension of Mr.Anturkar also does not survive.

9. In such circumstances, petitions can be disposed of in terms of orders passed by this Court and my order dated 16th April 2004. Petition disposed of accordingly. No costs.

(S.C.Dharmadhikari, J)